(summarizing record materials) (Defendants' Joint Statement). Congress had evidence that, as of 1988, 280 broadcast stations had been denied carriage on 1,533 occasions, while 313 stations reported 1,274 incidents of adverse repositioning. J.S. App. 11a.[11] Appellants' own data on remand showed that, before must-carry was introduced in 1992, the "typical cable system" had denied carriage to between 28% and 31% of available local broadcast stations. Gov't Mem. in Opp. to Pl. Mot. for Sum. Judg. 11 (June 21, 1995) (citing Besen Dec.). When identified by station type, those data showed further that the typical cable system had denied carriage to 39-40% of UHF independent commercial stations (excluding home shopping networks and other miscellaneous networks), and 22% of local public television stations (including 30-31% of UHF public stations). *Id.* at 11-12 (citing Besen Dec.). "[A] slew of notable experts" also expressed agreement with Congress's conclusion "that cable operators had and have substantial and increasing incentives to act adversely to local broadcast stations." J.S. App. 14a. And, as for the impact upon a station once cable carriage is denied, Justice Stevens' observation in *Turner* that "it is a practical certainty that a broadcaster dropped from the local cable system would suffer substantial economic harm," 114 S. Ct. at 2474 (opinion concurring in part and concurring in the judgment), was

[11] As Judge Sporkin noted (J.S. App. 12a-13a), those data may well understate the extent of the potential damage, since there is evidence that the cable industry refrained from dropping broadcast stations during the period preceding the passage of the 1992 Cable Act, out of a hope that such self-restraint might deter Congress from enacting the must-carry rules. See p. 9, *supra*.

also vindicated by substantial evidence. J.S. App. 15a-18a; see also Defendants' Joint Statement, *supra*, ¶¶ 48-75.

In sum, there is substantial evidence to support a reasonable conclusion that, without the must-carry rules, a significant number of broadcast stations would be dropped by cable operators in favor of their own programming. Congress was therefore legitimately concerned that, in the absence of the must-carry rules, "the role of local television broadcasting in our system of communications will steadily decline." H.R. Rep. No. 628, 102d Cong., 2d Sess. 67 (1992).[12]

3. The remand instructions of *Turner* also called for a limited inquiry into whether the must-carry rules are narrowly tailored, *i.e.*, whether the must-carry requirements "do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" J.S. App. 18a (quoting 114 S. Ct. at 2470 (plurality opinion)). Based on the evidence presented, the district court cor-

[12] Judge Williams agreed that Congress was addressing real and substantial problems when it enacted the must-carry provisions of the 1992 Cable Act. He concluded "that Congress could reasonably believe cablecasters' vertical integration with programmers constituted a problem—especially if one takes into account the special congressional concern for 'promoting a diversity of views' and the price-regulated status of cablecasters—for which it might seek a fix." J.S. App. 80a-81a. Judge Williams also found sufficient evidence of "operator predation" against broadcasters to preclude summary judgment for appellants on that issue, *i.e.*, evidence from which Congress could reasonably infer that competition between cable operators and local broadcasters "may induce cable operators to deny carriage to some broadcast stations." *Id.* at 87a-88a.

rectly concluded on remand that must-carry is narrowly tailored.

a. The remand instructions first called upon the district court to address "the actual effects of must-carry" on cable operators' speech. 114 S. Ct. at 2472 (plurality opinion). The district court found that those effects are not substantial. As Judge Sporkin pointed out, the total number of all broadcasting channels added to cable systems because of must-carry constitutes only 1.2% of the cable industry's channel capacity. J.S. App. 19a. A significant majority of cable operators (at least 69%) have not had to add any broadcast stations to their lineup. *Id.* at 19a-20a. Almost half of all cable systems still have open capacity. *Id.* at 93a. Accordingly, the district court correctly "determined that [must-carry's] burden to the cable industry is quite small and is expected to diminish." *Id.* at 22a.

Plenary review is not required to confirm that those conclusions are correct. Neither appellants nor Judge Williams has disputed the accuracy of the underlying findings on which Judge Sporkin's conclusions are based. See J.S. 15-16; J.S. App. 90a-96a. Although appellants assert that "the must-carry law has denied substantial numbers of cable programmers the most significant outlet for their speech" (J.S. 16), they offer no evidence in support of that statement, and certainly none that differs from the data cited by Judge Sporkin (see J.S. App. 18a-22a). Indeed, the evidence of must-carry's limited impact on the cable industry was supplied, in principal part, by the testimony of appellants' own expert. See *ibid.*

Appellants err in arguing (J.S. 15-16) that Judge Sporkin reduced the narrow tailoring analysis to the question whether cable speakers are "economically

crippled" by must-carry. Adhering to the premises of this Court's remand decision, and of the litigation of the issue by both sides on remand, the district court assumed that all programming has equal First Amendment value, and it analyzed the impact of the must-carry rules in terms of opportunities for access to the viewing public. Judge Williams' analysis of the broadcast industry's need for must-carry (J.S. App. 48a-61a) employed the same approach. A comparison of the benefits of must-carry to broadcasters with its burden on the cable industry is permissible and appropriate under conventional First Amendment analysis, and was called for by the remand instructions in *Turner*.

b. The *Turner* remand also instructed the district court to provide "judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means.'" 114 S. Ct. at 2472 (plurality opinion). The district court concluded that the various suggested alternatives would not be so effective as the must-carry rules in achieving the important objectives of providing fair competition in the television programming market, preserving the benefits of free broadcast television, and promoting wide dissemination of information from a multiplicity of sources. J.S. App. 22a-27a. Appellants challenge (J.S. 17) that conclusion as a departure from a focus upon the economic viability of the broadcast industry "as a whole." But the district court's evaluations of less speech-restrictive alternatives (J.S. App. 22a-27a) are correct and fully supported by the record.

With respect to A/B switches, "there was substantial evidence before Congress from which it could reasonably conclude that these switches do not represent an equally effective alternative." J.S. App.

23a. In many instances, a cable subscriber using an A/B switch would also have to have an outdoor antenna to obtain over-the-air signals of acceptable quality. But most cable subscribers do not have such antennas, and one of the important benefits of cable service is that antennas are not needed. See Defendants' Joint Statement, *supra*, ¶¶ 230-232 (summarizing evidence that most cable subscribers do not have outdoor antennas, and that many are prohibited from having them by restrictive covenants). From a consumer survey, Congress drew the conclusion that "[c]onsumers appear unwilling to bear the expense of subscribing to cable and of maintaining an adequate antenna for off-the-air [*i.e.*, over-the-air] reception." J.S. App. 24a. In addition, broadcast signals captured with an antenna often do not match the quality of signals obtained by cable; thus, because of problems of "signal degradation and signal leakage," over-the-air broadcasters excluded from cable operators' lineups are at a serious competitive disadvantage relative to programmers carried over cable, even if consumers do have A/B switches and antennas. *Ibid.*; see Defendants' Joint Statement, *supra*, ¶¶ 233-234. Congress therefore drew the reasonable conclusion that most cable subscribers will watch only programming carried over the cable, and will not install A/B switches and antennas to watch over-the-air stations excluded by cable operators.[13]

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[13] Judge Williams did not dispute the evidence, cited by Judge Sporkin (J.S. App. 24a), that only a tiny fraction of cable subscribers had ever used an A/B switch to receive a broadcast television signal. Instead, he concluded, based on his own review of the historical record, that viewers do not use A/B switches because cable operators already carry all the broadcast stations "that viewers regard as worth switching to." See *id.* at 106a; slip op. 63 (dissenting opinion). (Some language in Judge Williams' dissent is omitted from the version reprinted at J.S. App. 106a, apparently due to a printing error.) That is precisely the kind of *de novo* review that this Court abjured in *Turner*; Judge Williams never explained why Congress could not reasonably conclude that cable subscribers' unwillingness to use A/B switches stems from the cost, inconvenience, and technical complexity of doing so.

The leased access regime favored by Judge Williams (J.S. 96a-103a) is also an insufficiently effective alternative. Must-carry rests on the premise that some broadcasters are economically vulnerable and would fail or significantly deteriorate if denied access to the large portion of the viewing public that subscribes to cable. Leased access would create an anomalous situation in which the most vulnerable programmers would have to pay for access to the public via cable, while prosperous network affiliates would be carried for free. Moreover, the cost of leased access is likely to be prohibitive for smaller, independent stations, as many cable programmers not carried by cable operators have discovered. See Defendants' Joint Statement, *supra*, ¶ 238. To pay for leased access, financially marginal stations would have to rechannel expenditures from programming to access. See J.S. App. 26a. That result would be directly contrary to Congress's objective of ensuring the survival of high-quality local programming, an objective reflected in Congress's express prohibition against charges by cable operators for compliance with their must-carry obligations. 47 U.S.C. 534(b)(10) (Supp. V 1993).[14]

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[14] Furthermore, the leased access approach is not more narrowly tailored than must-carry, for it does not interfere less

An even more limited obligation to carry local broadcast stations, such as the one embodied in the FCC's previous "*Century* rules," would also be inadequate to accomplish the important governmental interests served by must-carry.[15] Evidence presented to the district court showed that the *Century* rules would deny protection to 86% of the broadcast stations added to cable systems by virtue of the 1992 Cable Act's must-carry provisions. As a result, in the great majority of cases, the *Century* rules would ensure carriage only of those stations that cable operators would carry voluntarily, and would do little to accomplish the survival of financially vulnerable stations, including some public television stations. Judge Sporkin therefore concluded, with sound support, that the *Century* rules "clearly would not come close to providing the [same] coverage as that provided by the 1992 Cable Act rules." J.S. App. 23a.

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with cable operators' editorial discretion over their cable systems. In every case in which a broadcast station acquired carriage by invoking leased access, the interference would be the same as that caused by must-carry. The interference would be even greater if cable operators were required to afford leased access to cable programmers as well, as Judge Williams suggested.

[15] See *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987) (holding rules unconstitutional), cert. denied, 486 U.S. 1032 (1988). The *Century* rules limited the pool of potential must-carry stations to those that demonstrated a particular minimum viewership, generally equal to an average share of total viewing hours of at least 2%, and a net weekly circulation of 5% of noncable households in the county in which the cable system was located. The rules also exempted cable operators with 20 channels or fewer from mandatory carriage. See 835 F.2d at 296-297.

The district court also recognized that various other proposed alternatives are inadequate. An administrative complaint mechanism, requiring the FCC to examine cable operators' business decisions to carry or not to carry individual programmers, would be highly cumbersome and would involve long delays. J.S. App. 27a. Antitrust lawsuits challenging cable operators' carriage decisions would be inordinately expensive, especially for a station on the brink of failure, or just beginning operation. See Defendants' Joint Statement, *supra*, ¶ 245. Finally, a system of direct governmental subsidies to local broadcasters would require Congress "to make the complex determinations as to who to subsidize, how much the subsidy would be and when the subsidy would end." J.S. App. 25a-26a. The administrative difficulties with such a system would be legion, and Congress could become embroiled in controversies related to particular stations' editorial positions. Also, a broad subsidy system would further goals materially different from those to which must-carry is addressed. Whereas subsidies would guarantee broadcasters a minimum income, Congress was concerned, rather, with allowing broadcasters to compete fairly for a share of the viewing public over the cable (and, concomitantly, to compete fairly for advertising revenue). A subsidy system would guarantee the survival even of broadcasters that do not engage the attention of the viewing public and, therefore, would not be a means commensurate to Congress's ends.

4. The First Amendment issues presented by the must-carry rules are "undeniably important" (J.S. 19), but it does not follow that the district court's decision on remand warrants this Court's plenary

review. The controlling questions of First Amendment doctrine—whether the must-carry rules are content-based, and whether Congress's legislative findings on the need for must-carry are entitled to deference—were resolved by this Court in *Turner*. The Court's resolution of those legal issues is not only entitled to the weight of *stare decisis*, but is also the settled law of the case for purposes of any further proceedings.

The FCC's recently opened rulemaking proceeding on the application of the must-carry rules to anticipated significant changes in television technology (see J.S. 19) does not provide support for appellants' request for plenary review. If, in the future, new FCC rules governing advanced television materially increase the burden of must-carry on cable operators, those operators will then have the opportunity to obtain judicial review of those rules. Even if must-carry does have an effect on advanced television, that effect will not be felt for several years. The prospect that the record in this case will at some point in the future become stale is not a compelling reason for this Court to expend substantial resources in reviewing the must-carry rules now.

5. The posture of this case is admittedly unusual because of Judge Jackson's stated reluctance to grant summary judgment to either side. Judge Jackson nevertheless did concur in the decision to grant summary judgment; like Judge Sporkin, he concluded that the evidence before Congress in 1992 was substantial enough to support Congress's prediction of serious harm to local broadcasting in the absence of must-carry protection. J.S. App. 33a. He also agreed with Judge Sporkin that the burden imposed on the cable industry by must-carry is minimal. *Ibid.* Judge

Jackson therefore concurred in Judge Sporkin's conclusion that the government on remand had established the two "essential propositions" underscored by this Court in *Turner*, and had shown that must-carry is narrowly tailored.

The other issues that Judge Jackson would have set for trial are not, in any event, suitable for definitive resolution in trial proceedings. For example, Judge Jackson remarked:

> [R]eplete as this record is with equivocal data as it relates to competition between conventional broadcasting and conventional cable, it is also conspicuously barren of information about still other market forces that may have vastly more significance in the immediate future, and will bear directly upon such issues as how long must-carry should constitutionally be allowed to last. We are told little, for example, about the effects to be anticipated from direct broadcast satellite and telephone company competition, or impending legislation. Nor are we able to discern much about the attitudes of the public itself, assuming consumer preferences were of concern to Congress at the time of the 1992 Cable Act and remain so today.

J.S. App. 37a.

Those are all matters of a predictive, legislative nature not within the competence of a court. Since Congress's conclusions about the need for must-carry are supported by substantial evidence, those conclusions should not be subjected to second-guessing by judges, even though those judges might prefer a yet more wide-ranging inquiry to assure themselves that the policy of must-carry has a sound basis. And

since the government has shown extensive evidentiary support (including well founded expert opinion) for the must-carry rules, the statute passes constitutional muster under the standards this Court previously ordained. The Court should therefore summarily affirm the district court's grant of summary judgment.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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